

U.S. DEPARTMENT OF THE INTERIOR
OFFICE OF HEARINGS AND APPEALS
INTERIOR BOARD OF LAND APPEALS

**PILOT ALTERNATIVE DISPUTE RESOLUTION REFERRAL PROGRAM
INFORMATION SHEET**

PROGRAM OVERVIEW

The Office of Hearings and Appeals (OHA), Department of the Interior (DOI), in collaboration with DOI's Office of Collaborative Action and Dispute Resolution (CADR) and with the assistance of the U.S. Institute for Environmental Conflict Resolution (the Institute), has developed the Interior Board of Land Appeals (IBLA) Pilot Alternative Dispute Resolution (ADR) Referral Program (the IBLA Pilot Program). The IBLA Pilot Program is one component of a Department-wide effort to expand the appropriate use of ADR processes to address environmental, public lands, and natural resources disputes involving DOI's Bureaus and Offices.

The IBLA Pilot Program establishes procedures to alert parties, during the docketing process, to the availability of voluntary ADR processes to achieve settlement of their appeals and to select, through use of ADR suitability criteria, appeals that may be appropriate for direct negotiation, assisted negotiation/mediation, or other ADR processes (for example, joint fact-finding). The IBLA Pilot Program is intended to inform the parties about the potential for ADR and to offer the parties an opportunity to develop creative solutions to their disputes, thereby reducing the expense and time involved in the appeals process and limiting potential further litigation.

PROCEDURES

Case Selection

Appeals filed with IBLA are selected for ADR by the Chief Administrative Judge and OHA Dispute Resolution Specialist. Selection may be made as a result of a request for ADR by one or more parties to an appeal. Otherwise, selection depends on an internal process, which generally takes place between the filing of the appeal and the conclusion of briefing. Some categories of cases are not suitable for ADR, such as mining claim maintenance fee cases, mining claim recordation cases, cases with short statutory or regulatory deadlines that cannot be waived or extended, some types of surface mining cases, and cases with jurisdictional defects such as late notices of appeals. The eligibility of other types of cases for the IBLA Pilot Program will be determined based on a number of criteria. These criteria include the nature of the underlying issues, whether a decision by IBLA is needed for precedential value, whether a decision by IBLA is needed to maintain an established policy or to avoid inconsistencies in that policy, whether the dispute involves individuals who are not parties to the appeal and are unwilling to participate in an ADR process, and whether one or more of the parties requests ADR.

Parties may request ADR orally or in writing by contacting the OHA Dispute Resolution Specialist, whose name and address are provided below. She may require that the request be

submitted in writing. The party may ask that its request be kept confidential and not be disclosed to other parties in the case. The OHA Dispute Resolution Specialist will consult with the Chief Administrative Judge to determine if the appeal is suitable for some form of ADR.

If the Chief Administrative Judge and OHA Dispute Resolution Specialist believe that the case is suitable for direct negotiation between the parties, the Chief Administrative Judge may issue an order requesting the parties to discuss settlement and provide periodic reports. Because ADR processes are voluntary, the parties are not required to settle the appeal and, if they believe that no resolution can be reached through direct negotiation, they should advise the Chief Administrative Judge or his designee of that fact in the report.

If the Chief Administrative Judge and OHA Dispute Resolution Specialist determine that another form of ADR, such as assisted negotiation/mediation, is appropriate, the OHA Dispute Resolution Specialist will contact the parties and explain the ADR program. If the parties agree to participate in an ADR process, the OHA Dispute Resolution Specialist will create a separate ADR file, which will include any request for ADR. The case will thereafter be tracked in a separate ADR docketing system until the appeal is resolved through ADR or returned to the normal decision making process. Cases in ADR will be formally suspended pending completion of the process.

The parties may terminate the ADR process at any time. If a settlement agreement resolving the entire appeal is reached through direct negotiation or another form of ADR, the appeal will be dismissed. The settlement agreement need not be approved by IBLA unless the parties so request. If parts of the appeal are resolved through direct negotiation or another ADR process, those parts will be dismissed and the unresolved issues will be decided through the normal administrative appeals process. If the parties terminate the process without reaching an agreement, the appeal will be resolved through the normal administrative appeals process.

Pilot Program Neutrals

If an appeal is selected by the Chief Administrative Judge and OHA Dispute Resolution Specialist as appropriate for a form of ADR other than direct negotiation, such as assisted negotiation/mediation, the OHA Dispute Resolution Specialist will contact the parties to provide more information about the process. She will assist the parties with the execution of an agreement to proceed, the establishment of time frames, and the selection of a neutral third party who is familiar with the appropriate form of ADR.

A neutral third party will be chosen by the parties and may include the OHA Dispute Resolution Specialist, other DOI neutrals, or members of the Institute's National Roster of Environmental Conflict Resolution and Consensus Building Professionals, who are located throughout the United States. Neutrals working for DOI have received extensive training in ADR, particularly assisted negotiation/mediation. Neutrals on the Institute's National Roster are carefully selected by the Institute to provide special skills and experience in the mediation of complex, multi-party environmental, natural resources, and public lands disputes. All parties must agree on the selection of a neutral. The primary role of the neutral is to help the parties reach a resolution of their appeal, or at a minimum, to resolve some of the issues in the appeal. If a complete settlement is not possible, the neutral may be able to help the parties clarify or eliminate issues to expedite the appeals process.

The OHA Dispute Resolution Specialist and other DOI neutrals do not charge the parties a fee for their services, so the only costs may be for any necessary travel. Outside neutrals generally charge for their services by the hour, with travel costs added. Fee payment arrangements are negotiated by the parties as part of the agreement to mediate prior to commencement of the mediation process.

Confidentiality

The confidentiality of communications made during assisted negotiation/mediation is governed by the provisions of the Administrative Dispute Resolution Act of 1996, 5 U.S.C. § 574, and DOI confidentiality guidelines. The Act's provisions preclude a mediator from disclosing confidential information unless

- (1) the parties agree in writing to disclosure of the information;
- (2) the information has already been made public;
- (3) the disclosure of the information is required by law; or
- (4) a court determines that disclosure of the information is necessary to prevent manifest injustice, help establish a violation of law, or prevent serious harm to public health or safety.

These provisions also prohibit parties to the assisted negotiation/mediation from disclosing confidential information unless

- (1) the party prepared the information;
- (2) all parties agree in writing to the disclosure;
- (3) the information has already been made public;
- (4) the disclosure of the information is required by law;
- (5) a court determines that disclosure of the information is necessary to prevent manifest injustice, help establish a violation of law, or prevent serious harm to public health or safety;
- (6) the disclosure of the information is relevant to determining the existence or meaning of a settlement agreement resulting from the assisted negotiation/mediation, or to enforcing such an agreement; or
- (7) the information was provided to, or available to, all parties, unless that information was communicated by the mediator.

The parties may agree to additional confidentiality protection among themselves, but that additional confidentiality protection does not prevent information not specifically protected under the Administrative Dispute Resolution Act from disclosure pursuant to other statutes such as the Freedom of Information Act. The statutory confidentiality provisions and any additional agreements among the parties concerning confidentiality will be included in the agreement to mediate signed by the parties. Further information about confidentiality will be provided to the parties if their case is selected for inclusion in the IBLA Pilot Program.

IBLA has also established procedures to ensure that confidential information generated during assisted negotiation/mediation will not be disclosed to the Administrative Judges adjudicating the appeal. Papers generated by the mediation process, other than required status reports, are not included in IBLA case files, and the substance of communications made during the mediation process is not at any time made known to IBLA. The OHA Dispute Resolution

Specialist is responsible for program administration and evaluation, maintains a separate docket for cases referred to assisted negotiation/mediation or other ADR processes, acts as liaison between the Institute, the neutrals, and IBLA personnel, and observes strict confidentiality about the content of the mediation in particular cases.

The neutrals chosen by the parties will protect the confidentiality of all proceedings and will not communicate with the IBLA Administrative Judges about what transpires during ADR sessions.

These protections are not intended to preclude disclosure of the appeals that are chosen for ADR, nor are they meant to prevent dissemination of information about the types of appeals going through the IBLA Pilot Program and about overall program results. Generic information about the program and cases entering it is available to interested persons, and reports are generated for analysis and evaluation. Individual cases that have been resolved through ADR may be publicly identified or brought to IBLA's attention as program successes unless the parties request otherwise.

Additional Internal Practices

If IBLA determines that a case is suitable for ADR, the OHA Dispute Resolution Specialist will convene a telephone conference with the parties to explain the ADR process in greater detail, including confidentiality, and will ask the parties if they want to proceed with an ADR process. The parties are free to choose to have the appeal decided through the normal decision-making process. Parties who choose to participate in an ADR process will be required to provide the Chief Administrative Judge with status reports about the progress of the ADR process at monthly intervals, unless the Chief Administrative Judge directs otherwise.

The Chief Administrative Judge may designate another IBLA Administrative Judge to perform any of his functions under the IBLA Pilot Program.

FURTHER INFORMATION

For further information about the IBLA Pilot Program, please contact:

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